Supreme Court, U.S.
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No. 90-1907

In The

Supreme Court of the United States

October Term, 1991

DELUXE SHEET METAL, INC.;
HERRMAN & GOETZ, INC.,

Petitioners,

v.

PLYMOUTH PLASTICS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Indiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JERE L. HUMPHREY
KIZER & NEU
319 West Jefferson Street
PO Box 158
Plymouth, Indiana 46563
(219) 936-2169

MARK E. WAGNER
RICHARD F. JOYCE
KIZER & NEU
319 West Jefferson Street
PO Box 158
Plymouth, Indiana 46563
(219) 936-2169

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Indiana Mechanic's Lien Statute which grants to subcontractors an *in rem* action against a non-debtor owner's real estate is in conflict with an order of stay in a general contractor's bankruptcy.

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STATEMENT OF THE CASE

A. FACTS

Appellee acknowledges that Appellants' Statement of the Case is substantially correct. A significant additional fact is that the parties stipulated "that Defendant Plymouth Plastics, Inc., has paid in full the contract amount due from it to Roger L. Wright Construction Company, Inc." (D.R. 102 and 125)

B. INDIANA STATUTORY BACKGROUND

In this portion of the brief Appellants state "the doctrine of relation back is critical because it is this feature which triggers the exception to the automatic stay. . . . " Appellees takes issue with that statement. Since the property of the debtor was never implicated, Appellants did not need the exception to the automatic stay in order to perfect. No exception was necessary because no property of the debtor was implicated and therefore the automatic stay itself did not apply.

C. PRIOR PROCEEDINGS IN THE INDIANA COURTS

This section contains an inadvertent misstatement. Wright Construction Company did not move to dismiss the actions; Plymouth Plastics, Inc., moved to dismiss the actions.

SUMMARY ARGUMENT

Since the Indiana Mechanic's Lien law does not require the joinder of the general contractor in a foreclosure suit against the real estate of a third party owner, there is no violation of 11 U.S.C. Sec. 362 (a)(1) when the subcontractor forecloses against the real estate in an *in rem* proceeding. Moreover, sections 362(a)(3)(4) and (6) are not violated because no property of the bankrupt's estate is implicated in the foreclosure.

Further, the cases cited by Appellants to support their position are easily distinguished. First, in some of the cases cited, the property foreclosed on was the debtor's property and not some third party. In other cases, the mechanic's lien statutes being interpreted were unlike Indiana's in that those statutes gave a lien on funds in the hands of the third party owner still owing to the debtor. Also, other cases relied upon by the debtor had a possessory interest in the real estate being foreclosed upon and thus the debtor's property was involved.

Finally, Appellants' argument that the owner and general contractor are intertwined is not supported by any authority. While the intertwining concept exists in the law, no facts support the application of it to this case, and the attempt by Appellants to do so stretches the law far beyond the cited cases.

ARGUMENT

I. THE FACTS OF THIS CASE MAKE IT A POOR CASE FOR ANY CERTIORARI CONSIDERATION. MOREOVER, NO CONFLICT EXISTS BETWEEN THE INDIANA DECISION AND FEDERAL AUTHORITY.

Contrary to Appellants' assertion, the facts of this case make it a bad case to decide issues as sweeping as Appellants claim. Appellants attempt to tag on to the following cases: *Valley Transit Mix of Ruidoso, Inc. v. Miller,* 928 F.2d 354 (10th Cir. 1991); *Garbe Iron Works v. Priester,* 99 Ill. 2d 84, 76 Ill. Dec. 428, 457 N.E.2d 422 (1983); *In Re: Hunter's Run Limited Partnership,* 875 F.2d 1425 (9th Cir. 1989); *In Re: 48th St. Steakhouse, Inc.,* 835 F.2d 427 (2nd Cir. 1987), *Cert. denied* 45 U.S. 1035, 108 S.Ct. 1596, 99 L.Ed.2d 910; *A.H. Robbins Company, Inc. v. Piccinin,* 788 F.2d 994 (4th Cir. 1986). Yet, this case is not factually similar to those cases. For example, two of those cases *Valley Transit-Mix* and *In Re: 48th St. Steakhouse, Inc.,* turn on the fact that the debtor had a leasehold interest in the property and therefore the property of the debtor was implicated because of the lease. There is no lease here. The Indiana Appellate Court was willing to recognize that a possessory interest of a debtor implicated the property as property of the debtor's estate:

> Although the debtor in *In Re: Barksdale* (Bankr. W.D. Vir. 1981) 15 B.R. 731, was not the owner of the real estate on which Plaintiff filed its foreclosure action, the debtor had a *possessory interest* in the real estate and the provisions of the automatic stay were broad enough to protect the debtor's interest. *Deluxe Sheet Metal, Inc., and Herrman & Goetz, Inc. v. Plymouth Plastics, Inc.*

(1990), 555 N.E.2d 1297, 1299. (Emphasis original)

Further, in *In Re: Hunter's Run Limited Partnership,* labor and materials were furnished to certain real property of the debtor. When the debtor's property has received the improvements, of course the debtor's property is implicated, and the automatic stay applies. The instant case concerns real property of a third party, not the debtor, and is therefore easily distinguished.

The case of *A.H. Robbins* is totally inapplicable. Apparently it is cited to support Appellants' theory of intertwining in order to stretch the argument to cover assets of non-debtors. However, in all of the intertwining cases there was a relationship independent of the action involved in the bankruptcy. In *A.H. Robbins,* the third party was a guarantor. Here, the third party landowner had no relationship, and thus no intertwining, with the general contractor. Hiring the general contractor to build the building is not an intertwining as defined by the federal courts. In *A.H. Robbins* the Court cited with approval the case of *Johns-Manville Sales Corporation,* 26 B.R. 405, 410 (S.D.N.Y. 1983) which cited the frequently cited case of *Royal Trucks and Trailer v. Armadors Meritina Salvadoreana,* 10 B.R. 488, 491 (N.D. Ill. 1981):

> . . . "[T]here are cases [under 362 (a)1] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants" but, it adds, that in order for relief for such non-bankrupt defendants to be available under (a)1 there must be "unusual circumstances" and certainly "something more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 Bankruptcy must be shown in order

> that proceedings be stayed against non-bankrupt parties". *A.H. Robbins Company, Inc.* at 999.

The Court then goes on to define this "unusual situation" as follows:

> This "unusual situation", it would seem arises when there is such identity between the debtor and the third party defendant that the debtor may be said to be the real party defendant and that a judgment against the third party defendant will in effect be a judgment or finding against the debtor. *Id.*

All we have in this case is a landowner hiring a general contractor to build a building. Appellants have wrenched the concept of intertwining interests far beyond its original concept. It does this by stating at page 17 of its petition:

> The intertwining of interest is obvious. It results from the derivative nature of the subcontractor's claim against the owner and the owner's right either to indemnification from the general contractor if he has to pay twice for the same work in order to satisfy a mechanic's lien or to set off against any amount which owner still owes the debtor/general contractor. Either action would affect the amount of money available in the bankruptcy estate for the general contractor's creditors. *Id.*

The premise and conclusion of this thought are not totally correct. While there need not be privity between the owner and the subcontractor, derivative is not a good word to describe the subcontractor's right of action against the owner. If it were, then the fact that the owner had paid the general contractor would defeat the subcontractor's right of action, but Indiana law allows a

subcontractor an independent right of action even though a general has been paid:

> The statute gives the subcontractor an absolute lien, not effective by the mere failure of the principal contractor to perform his contract, or by the cancellation or recision thereof, or by the removal of the work, or payment of the principal contractor. 19 I.L.E. *Mechanics' Liens* Sec. 32 (1959).

Further, Congress by enacting § 553 of the bankruptcy code granted to third parties the right of set-off against the debtor. Does this mean that by paying a subcontractor and then exercising a right of set-off, that an owner has either violated the stay or has become intertwined to such an extent that the identity of the debtor and third party are one and the same? No case has even come close to such a position. However, in the case of *Yobe Electric, Inc. v. Graybar Electric Company,* 30 B.R. 114 (Bkrtcy. W.D. P.A. 1983) the bankruptcy court recognized that certain sections of the bankruptcy code may impinge on other sections:

> While the Court realizes that the Owner's withholding of funds may have a deleterious effect upon Debtor's efforts to reorganize, it cannot deprive the sub-contractor of its clear right under state law, as protected by § 546(b) of the Bankruptcy Code. *Id.* at 119.

Because the Indiana Legislature has chosen to protect subcontractors by giving them a right directly against the property of the owners, that statutory right does not mean that the owner is now intertwined with the general contractor.

Appellants cite an Illinois Supreme Court case *Garbe Iron Works* and state that this court should intervene because of the split of authority between *Garbe* and this case. Illinois has a mechanics lien law different from Indiana. How can there be a split of authority when each state is allowed to interpret its own mechanics lien statute? Kentucky it seems also distinguishes *Garbe* in the same way Indiana does:

> *Garbe,* however, is clearly distinguishable in that Illinois Law required that suit could not be instituted against the surety without joining the principal. That is simply not the law in Kentucky. *Cumberland Metals, Inc. v. Kentucky Insurance Guaranty Association,* Ky. App. 801 S.W.2d 339 (1990).

In a further attempt to persuade this Court, Appellants on page 16 of their petition cite eight cases which they say support their position. None does. The cases of *Matter of Fiorillo,* 19 B.R. 21 (Bankr. S.D. NY. 1982) and *In Re: Houts,* 23 B.R. 705 (Bankr. M.D. MO. 1982) and *In Re: Hunter's Run Limited Partnership* dealt with mechanics liens on property owned by the debtor. In *In Re: Nash Phillips/Copus, Inc.,* 78 B.R. 798 (W.D. Tex. 1987) the subcontractor sued the debtor corporation in State court as part of the mechanics lien foreclosure process, unlike Indiana law where the debtor need not be joined. *In Re: Tull and Sons, Inc.,* 25 B.R. 709 (Bkrtcy. D. Md. 1982) concerned "funds in the hands of an owner which funds were contractually due to the debtor" *Id.* at 710. The Indiana Court of Appeals correctly distinguished the cases of *In Re: Tull* and *Yobe Electric, Inc. v. Graybar Electric Company,* 30 B.R. 14 (Bkrtcy. PA. 1983) and noted that *Yobe* is in agreement with Indiana law stating:

> In response the subcontractor argued that the mechanic's lien involved in *in rem* action against the real property of the owner and that it had not attempted to lien *any funds* in the hands of the owner. *Deluxe Sheet Metal, Inc. and Herrman & Goetz, Inc. v. Plymouth Plastics, Inc.*, (1990), Ind.App., 555 N.E.2d 1296 at 1300. (Emphasis original)

The case of *In Re: APC Construction, Inc.*, 112 B.R. 89 (Bkrtcy. D. VT. 1990) turned on the interpretation of the Vermont mechanic's lien law which is different from Indiana because:

> Under Vermont Law a subcontractor is entitled to a contractor's lien only to the extent any monies are owed from the owner to the general contractor. *Id.* at 100.

The Indiana Court of Appeals correctly explained the Indiana statute:

> The subcontractors have mechanic's liens on the owner's *real estate*, not on funds in the owner's hands. *Deluxe Sheet Metal* at 1300.

Concerning the case of *In Re: Birdview Satellite Communications*, 90 B.R. 465 (Bkrtcy. Kan. 1988) it is difficult to see how it supports Plaintiff's position. The case turned on the Kansas Mechanic's Lien law, and the Court concluded that since the claimant did not commence suit within one (1) year, the Trustee could avoid the lien.

Finally, the stipulation entered into between the parties that the amount owing from the owner to the debtor had been paid in full is a recognition that no property of the debtor was implicated and is further grounds for denying Appellants' petition.

CONCLUSION

The provisions of Section 362 are directed toward prohibiting actions against the debtor or the debtor's estate. The Indiana Mechanic's Lien Statute gives to subcontractors an *in rem* action against the owner's real estate, not funds due and owing to the general contractor. Moreover, the law of intertwining relationships has never been stretched to cover a situation where the only relationship between the owner and the debtor was the construction project in issue. Also, payment in full by the owner to the debtor precludes any possible argument claiming that a property interest of the debtor is implicated.

Respectfully submitted,

JERE L. HUMPHREY
(Counsel of Record)
KIZER & NEU
319 West Jefferson Street
P.O. Box 158
Plymouth, Indiana 46563
(219) 936-2169

MARK E. WAGNER
RICHARD F. JOYCE
KIZER & NEU
319 West Jefferson Street
P.O. Box 158
Plymouth, Indiana 46563
(219) 936-2169

Attorneys for Respondent

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